

## Strange Goals: Ends of the “Broadcast Flag”

I oppose the FCC Notice of Proposed Rulemaking #02-230, for the reasons stated below.

My first concern at this point primarily deal with the way in which consumers’ loss of freedom to the “broadcast flag” requirement is justified.

First, ignoring for now the broadcast flag’s supporters’ assertion that no consumer freedoms will be lost to this new scheme, why do consumer losses of freedom need to be justified? After all, as Congressman Barney Frank said of copyright holders, “These creative people don’t have to give up their rights for the public interest!”

But I will defer to the Constitution:

[Congress shall have the power] to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Presumably, promotion of the progress of science and the useful arts is a public goal, which is why the government interferes with such commerce in the first place. It is therefore justifiable—by law—only on public grounds.

Still regardless of whether or not the broadcast flag impedes consumers: FCC 02-230<sup>1</sup>, and previously the CBDTPA<sup>2</sup> offer a preview of the all-important benefit consumers receive under the vision of the future offered by these documents: **the DTV Transition!**

The way I read these documents, it seems that the all-overriding good for consumers is DTV. The CBDTPA offers the growth of broadband networks and growth of DTV to justify the broadcast flag:

(9)The secure protection of digital content is a necessary precondition to facilitating the transition to high-definition television<sup>3</sup>, which will benefit consumers.

Necessary? Well, as a tech fan, and thus more susceptible to “upgrades” than most, my transition to broadband has been “facilitated” just fine through regular [today], non-broadcast flagged Internet use. As for DTV, I’ll defer to my point.

FCC 02-230 also speaks of DTV as a “Holy Grail” of technology policy.

- “The current lack of digital broadcast copy protection may be a key impediment to the [DTV] transition’s progress.”
- “Without such programming, consumers may be reluctant to invest in DTV receivers and equipment, thereby delaying the DTV transition.”
- “. . .and with a view towards facilitating the DTV transition. . . .”
- “To what extent would the absence of a digital broadcast copy protection scheme and the lack of high quality digital programming delay or prevent the DTV transition?”

Especially following that last quote, you seem to be more concerned with how consumers will be impacted by “losing” the Holy Grail than how copyright legislation affects them—as if it does not! Never mind that you begin with the assumption that “absence of a digital broadcast copy protection [sic] scheme” automatically leads to “lack of high quality digital programming,” solely based on the industry’s *promise*.

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<sup>1</sup> Available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-231A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-231A1.pdf)

<sup>2</sup> Available at <http://judiciary.senate.gov/special/cbdtpa.pdf>

<sup>3</sup> Here interchangeable with DTV.

These so-called supporters seem to selectively forget certain free-market principles from time to time. Namely, that each player has his/her/its own interests, including the consumers. What's more, they are in control of new technologies, by market rules, and the industries that produce the technologies are not. The content control industries' worries did not stop the Internet from becoming wildly popular, regardless of whether or not they were ready for it.

If consumers want DTV, then they will have their DTV. If they decide that DTV's properties are beneficial to them, then you will get your transition, either with the industry or not. Consumers don't have to negotiate on the industry's terms; the industry's existence depends on the consumers, not vice versa.

I see this as a preemptive strike by the content control industries against consumers, to try and get their preferred rules laid down ahead-of-time, before consumers are aware enough of the issues involved to fully protect their own interests—namely, the new freedoms available with new technology.

Would a regulatory copy protection regime create and maintain industry incentives to continually innovate to improve the method of digital content protection?

This is asked and answered in the same breath. If you mean by *improve protection*, “increase the level of industry restriction of consumer usage of digital content,” then they need no outside incentive, and this is irrelevant.

If you mean by *improve protection*, “increase consumers' ability to work with content,” then the answer is no. Groups such as the BPDG are fond of citing “protecting legitimate consumer expectations” as their justification for producing new content restriction mechanisms.

I find their definition of said expectations very strange, however. They mean to say “what consumers can do **today**.” Now, what exactly is the benefit of new technology, if it does not allow us to do more than we did with older technology? The way this broadcast flag wishes to encourage “the DTV Transition” is likable to encouraging a transition from compact discs whose underside is silver to compact discs whose underside is gold.

As for technical benefits of analogue versus digital, I offer experience: being one of those with the relatively rare gift of being able to tell the difference in both audio and video, I don't notice that difference except when specifically looking for it.

So the last remaining benefit, after the new abilities and technical advantages are taken away, is widescreen (in the case of DVD, the digital equivalent of VHS). However, this disadvantage of the older formats is purely artificial, as proven by, e.g., the TV show *Enterprise* or the VHS edition of the movie *The Insider*, both widescreen releases. The content control industries can easily extend this benefit to all analogue video formats, without bothering about FCC rulemaking.

You ask about consumer privacy interests. In particular, you inquire as to the possible necessity of rules. This is unacceptable. If the “rules” of copyright are not enough for the content controllers to “give” consumers “the DTV Transition”, that is to say, they demand physical protection through software and hardware, then I demand the same. That is to say, any privacy scheme must be as impenetrable as content would be were no devices available that could break the “rules” about copying. **You cannot do this**, given the next requirement:

... a broadcast flag system would not interfere with consumers ability to make secure copies of DTV content for their personal use, either on personal video recorders or removable media.

The keyword is “personal”. From the qualifier “for their personal use”, I conclude there are two categories of use, personal and non-personal, where the only satisfactory distinguishing mark is that person behind the use. What is the difference between my recording device and my neighbor’s? They are mass-manufactured, after all; it is only the person that identifies with it. So to effectively enforce these restrictions, you must match the devices to their respective persons, and check each of the actions performed with them. That is a violation of privacy; I may not own the taped TV show, but I do own my device, and until you have evidence that I may be performing illegal activities with that device, you have no right to monitor it.

Ignoring this, how could these rules ever account for all the “legitimate” uses of these devices? Say I have borrowed my friend’s controlled recording device or controlled media storage unit, and would like to use it to record a show from my own controlled TV. How would this system know that I was not using that media to share illegally? Or say that I bring a show on my controlled media to a friend’s controlled TV, so that we may watch it more sociably? Or I lend it to him? These are the simplest possibilities, and already the flag fails. How will it account for new, legitimate uses? This is surely an important concern, seeing how technological advancement (the DTV Transition) is the guiding purpose of this bill, and new technology allows new uses, and old technology often presents us suddenly with new uses as well.

As there are no gains for the consumer, and there would be no point in a Transition that maintained the current level of everything, I must conclude that the consumer is harmed in some way by these rules, and the only reason to make this wonderful Transition under broadcast flag rules is to help the content restriction industries. When that industry gives me something, instead of taking my rights to use knowledge away, then I may be interested in helping them out. But not like this, and I don’t see how any rational consumer could want to.

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GnuPG Key: A543 9C89 168C 71B3 0DD1 A964 D807 1E62 29D9 E048